# Mandatory Binding Arbitration Provisions in Nursing Home Agreements: Potential Impacts of a Proposed CMS Rule

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Because this note was written in March of 2019, it is relevant to address developments to *Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements*, 82 FED. REG. 109 (June 8, 2017), the "2017 CMS proposed rule" as discussed herein, that are more recent to the note's publication. The rule was finalized on July 16, 2019 and went into effect on September 16, 2019. The final rule retains many of the same elements found in the proposed rule, however, certain elements have changed, and some concerns have been addressed. For example, the final rule prohibits long-term care facilities from requiring that potential residents sign a binding arbitration agreement as a condition of admission, and it indicates that state law should apply in an evaluation of capacity to contract. The final rule can be found at 42 C.F.R. § 483 (2019).

## I. INTRODUCTION

In 2016, the Centers for Medicare and Medicaid Services (CMS) under the Obama Administration prohibited nursing homes from entering into pre-dispute agreements with their patients for binding arbitration. A Mississippi court issued an injunction and blocked the rule later that year. In 2017, CMS under the Trump Administration removed the prohibition, even allowing nursing home facilities to require that patients sign an arbitration agreement to gain admission. The comment period for the proposed rule is over, and CMS has put the rule into its "long-term action"[1] category. While this rule is still pending, its prospective passing raises a number of questions related to law and public policy.

Some impending areas of legal impact include complications with enforcement, concerns of maintaining the rights of those that enter into a contract, what to do when signatory issues arise, and preventing unconscionability. Public policy issues include balancing efficiency with individual rights, maintaining ethical values, and the concern that lack of precedent negatively impacts informed decision-making. The potential impacts to law and public policy of the proposed rule will be examined in this note. It will also offer recommendations for the structure of such provisions in general. This note expresses that, while arbitration is beneficial to nursing homes and their residents, the 2017 CMS proposed rule should not allow agreement to pre-dispute arbitration provisions to serve as a condition for admission.

## II. OVERVIEW OF ARBITRATION AND ITS USE IN HEALTH CARE

### A. *Arbitration Overview*

Alternative Dispute Resolution (ADR) is said to have originated in commercial disputes.[2] It consists of various methods of resolving conflicts outside of litigation.[3] The three most popular forms of ADR are negotiation,

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[1] Promoting Accuracy and Transparency in the Unified Agenda, 80 Fed Reg. 36,757 (June 26, 2015) (Rules in the "long-term action" category "are intended to reflect items that are under development but for which the agency does not expect to undertake a regulatory action in the twelve months after the publication of the most recent Agenda.").

[2] Marc Ginsberg, *The Execution of an Arbitration Provision as a Condition Precedent of Medical Treatment: Legally Enforceable? Medically Ethical?*, 42 WM. MITCHELL L. REV. 273, 279 (2016).

[3] *Alternative Dispute Resolution*, CORNELL LEGAL INFO. INST. (June 8, 2017), https://www.law.cornell.edu/wex/alternative_dispute_resolution.

mediation, and arbitration.[4] Negotiation is a process in which parties meet to discuss settlement options for their dispute.[5] The parties "control the process and the solution."[6] Similar to negotiation, mediation "bring[s] opposing parties together and attempt[s] to work out a settlement or agreement that both parties accept or reject"[7] with the help of a neutral mediator. Lastly, arbitration is a form of ADR that is "a simplified version of a trial involving limited discovery and simplified rules of evidence."[8] The arbitration is led by an arbitrator or panel of arbitrators chosen by one or both of the parties to the disagreement.[9] Arbitrators make a decision about liability and choose the amount and recipient of an award, if any.[10] Typically, these decisions are not available to the public.[11]

Enacted in 1925, the Federal Arbitration Act (FAA) established the "basic legal principles applicable to arbitration in the US."[12] The Act "governs the enforcement of agreements to arbitrate in contracts involving interstate commerce or in maritime transactions"[13] and applies to all such agreements so long as they are in writing.[14] Because health care is a matter of interstate commerce, agreements to arbitrate contracts concerning health care matters fall under the FAA.[15] Pursuant to the FAA, arbitration agreements must be considered valid, irrevocable, and enforceable.[16] Such agreements may be deemed unenforceable only "upon such grounds as exist at law or in equity for the revocation of any contract."[17] Furthermore, the decision of the arbitrator is binding, according to the FAA, and may only be revoked if the decision was "fundamentally unfair."[18] The FAA has received strong support from

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[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Federal Arbitration Act (FAA), Practical Law Glossary Item 6-501-6615 (Westlaw).

[13] William Phelps, Annotation, *Pre-emption by Federal Arbitration Act (9 U.S.C.A. §§1 et seq.) of State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements*, 108 A.L.R. FED. 179, § 2 (1992).

[14] FAA, *supra* note 15.

[15] Andi Alper, *Comment: Seeking Justice for Grandma: Challenging Mandatory Arbitration in Nursing Home Contracts*, 16 J. DISP. RESOL. 469, 477-78 (2016).

[16] FAA, *supra* note 15.

[17] Phelps, *supra* note 16, at § 4.

[18] FAA, *supra* note 15.

Congress and the United States Supreme Court.[19] Supreme Court precedent signifies the power of the FAA and its protection of the enforcement of arbitration agreements.[20]

### B. *Arbitration in Health Care*

Recent studies indicate that medical error is the "third most common cause of death in the United States."[21] Without a "constructive legal process," families of victims may not understand the error made or receive just compensation.[22] The tort claim of medical malpractice is a common route for injured parties, and it forces disclosure from physicians.[23] However, this creates an adversarial relationship between patient and physician.[24] In addition, malpractice claims often fail to make the victim financially and psychologically whole and don't adequately prevent future negligence.[25]

ADR was initially introduced to health care as a way to reduce malpractice litigation.[26] Now, it is recognized for other benefits to health care. Not only does ADR purport to save physicians and patients both time and money, but it allows both parties to gain closure and maintain a relationship.[27] The earliest method of ADR in health care presented itself as medical screening panels in the 1970s.[28] These panels consisted of medical experts that evaluated medical malpractice claims.[29] The experts would recommend that either the plaintiff sue or that the defendant settle.[30] However, the panels did not successfully reduce litigation.[31] Later on, binding arbitration provisions were introduced to health care contracts.[32] Patients that wanted to be treated by a physician would sign a contract including such a provision, and would thus be bound to the ruling of an arbitrator should the patient ever wish to

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[19] Phelps, *supra* note 16, at § 2.

[20] For a discussion of Supreme Court use of the FAA in regard to the enforceability of arbitration agreements, see *infra* Section V(A)(1).

[21] Lydia Nussbaum, *Trial and Error: Legislating ADR for Medical Malpractice Reform*, 76 MD. L. REV. 247, 248 (2017).

[22] *Id.* at 249.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 255-56.

[26] *Id.* at 251.

[27] Wesley Bulgarella, *Comment: A Better Forum for All: Addressing the Value of Arbitration Clauses in Nursing Home Contracts*, 86 MISS. L.J. 365, 382-83, 388 (2017).

[28] Nussbaum, *supra* note 24, at 251.

[29] *Id.* at 267.

[30] *Id.* at 270.

[31] *Id.*

[32] *Id.* at 272.

bring a claim against the physician.[33] These provisions, however, have not been widely adopted as appropriate means to resolving medical malpractice claims due to their inefficiency and failure to reduce medical liability costs.[34] Instead, today, medical malpractice claims are commonly settled by mandatory mediation.[35] In some jurisdictions, it is customary that mediation serve as a mandatory first step toward dispute resolution before efforts to litigate are made.[36] Mediation enhances communication between patient and provider, and it offers an opportunity for settlement negotiations.[37]

Malpractice claims are often the result of death or injury to a patient.[38] Claims against nursing homes commonly arise from the same tragedies.[39] Just as the use of arbitration in the broad health care context has been challenged based on inefficiency and replaced with a method of conflict resolution that protects patient interests, mandatory arbitration provisions in nursing home contracts should be questioned and reevaluated as well.

## III. NURSING HOME ARBITRATION CLAUSES

### A. *Nursing Homes in the U.S.*

Nursing homes support 1.4 million people in the U.S. and operate out of 15,600 facilities.[40] They are utilized for both acute care rehabilitation and long-term care.[41] Patients may be referred to a nursing home by their physician in order to recover from an acute illness or an operation.[42] In this case, a patient's stay lasts about 23 days, and insurance usually covers the costs for their stay because it was the result of a doctor's referral.[43] Comparatively, the population served through nursing homes for long-term care is primarily the

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[33] *Id.* at 272-73.

[34] *Id.* at 276 (discussing studies that found correlations between arbitration and increases in the cost of liability for medical systems).

[35] *Id.* at 277.

[36] *Id.* at 278.

[37] *Id.*

[38] Nussbaum, *supra* note 24, at 283.

[39] Rhys Burgess, *Protecting Those Who Cannot Protect Themselves: The Efficacy of Pre-Dispute Arbitration Agreements in Nursing Homes*, 17 LOY. J. PUB. INT. L. 1, 4 (2015).

[40] Bulgarella, *supra* note 30, at 367.

[41] Thomas Day, *About Nursing Homes*, NATIONAL CARE PLANNING COUNCIL (2017), https://www.longtermcarelink.net/eldercare/nursing_home.htm.

[42] *Id.*

[43] *Id.*

elderly.[44] In fact, about one in eight individuals 85-years-old and older reside in a nursing home.[45] The age of these individuals contributes to the likelihood that they experience disability—cognitively, physically, and medically—and, therefore, many nursing home residents require skilled care.[46]

The cost of nursing home care is tremendous. "In 2012, total spending (public, out-of-pocket and other private spending) for long-term care was $219.9 billion, or 9.3% of all U.S. personal health care spending."[47] Residents are charged daily and may have to pay for additional services or a private room, much like a hospital.[48] In 2004, it cost $192 per day, or $70,080 annually, to reside in a private room in a skilled nursing facility.[49] However, government payment systems are heavily involved in covering these costs: "State and Federal governments pay about 70% of nursing home costs, and for about 85% of all residents the government pays part of or all of their costs."[50] Medicare and Medicaid are the most influential players in nursing home costs and coverage, with Medicare covering 12% and Medicaid covering 50% of private nursing home costs.[51] The high health care costs associated with nursing home care gives the government incentive to be involved in the way that nursing home care is delivered. CMS routinely issues regulations relating to quality of care, health care coverage, and access to care. More recently, CMS has started to regulate nursing home contracts between the facility and its residents, namely, arbitration provisions in those contracts.

### B. *Arbitration Provisions in Nursing Home Contracts*

Mandatory arbitration provisions are oftentimes included in nursing home admission contracts and are regularly protected by the FAA.[52] The FAA preempts state law as well as the Nursing Home Care Act, which offers protections for nursing home residents.[53] Furthermore, in a Supreme Court decision upholding the enforceability of a nursing home arbitration agreement that ran afoul of state law, the FAA was also found to preempt "any state rule

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[44] *Selected Long-Term Care Statistics*, FAMILY CAREGIVER ALLIANCE (2015), https://www.caregiver.org/selected-long-term-care-statistics.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] Day, *supra* note 44.

[49] *Selected Long-Term Statistics*, *supra* note 47.

[50] Day, *supra* note 44.

[51] *Id.*

[52] Alper, *supra* note 18, at 472.

[53] Phelps, *supra* note 16, at 4.

discriminating on its face against arbitration."[54] Some successful arguments against nursing home arbitration agreements, however, have been that the potential resident did not have the mental capacity to sign the agreement or that the agreement's signatories were invalid.[55] While arbitration is praised for its low cost and timely outcomes, the provisions are challenged in the nursing home setting because of the circumstances which families are typically under when signing these contracts.[56] Often in emergent or stressful situations, the potential resident and their family members may not read the agreement carefully nor understand the rights they waive through an arbitration provision.[57] In recent rulemaking, CMS has directed the acceptable use of such provisions. But, differences between two particular rules indicate that even CMS is challenged by the arguments for and against arbitration.

## IV. CENTERS FOR MEDICARE AND MEDICAID RULES

In order for a nursing home's services to be covered by Medicare and Medicaid programming, the facility must meet CMS requirements.[58] While nursing home admission contracts have traditionally contained mandatory arbitration clauses, many nursing homes accept residents despite their hesitancy to sign such a provision.[59] However, CMS may change that. Since 2016, rules issued by CMS have addressed whether a nursing home should be allowed to limit their residents' course of legal action to binding arbitration.[60] In sharp contrast to their 2016 rule, the 2017 CMS proposed rule would allow nursing homes to deny a resident's admission, despite the resident's hesitancy to sign an arbitration provision, and still receive CMS funding.[61]

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[54] Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1426 (2017).

[55] *See* Cardinal v. Kindred Health Care, 155 A.3d 46 (Pa. Super. Ct. 2017), Washburn v. Northern Health Facilities, 121 A.3d 1008 (Pa. Super. Ct. 2015).

[56] Alper, *supra* note 18, at 471-73.

[57] *Id.* at 471-72.

[58] *See* Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 42 C.F.R. §§ 405, 431, 447, 482, 483, 485, 488, 489 (2016).

[59] Stephen Pokiniewski, *Arbitration Agreements in Nursing Home Cases*, THE LEGAL INTELLIGENCER, (Apr. 6, 2018, 11:40 AM), https://www.law.com/thelegalintelligencer/2018/04/06/arbitration-agreements-in-nursing-home-cases/.

[60] *Id.*

[61] *Id.*

### A. *2016 CMS Rule*

In 2016, CMS under the Obama Administration issued a rule prohibiting nursing homes from "entering into pre-dispute arbitration agreements with residents, conditioning admission to a facility on the execution of such agreements, or making a resident's continuing right to remain at a facility contingent upon a post-dispute arbitration agreement."[62] This regulation was met with much opposition from the long-term care industry.[63] In October of 2016, the American Health Care Association (AHCA) and a number of nursing homes filed for preliminary and permanent injunction in the United States District Court for the Northern District of Mississippi to preclude the ban on pre-dispute arbitration agreements issued by CMS.[64] The court held that it was unlikely that the CMS rule prohibiting pre-dispute arbitration agreements could stand against the FAA's "presumption in favor of arbitration."[65] As a result, the rule was stayed and never went into effect.[66]

### B. *2017 CMS Proposed Rule*

The 2017 Trump administration sought to "streamline" arbitration provisions in the long-term care setting and, through CMS, made many changes to the 2016 rule.[67] CMS completely eliminated its ban on pre-dispute binding arbitration agreements and issued new regulations that focused on transparency.[68] The new regulations require that agreements for binding arbitration be worded clearly, be explained to the resident in understandable terms, and allow the resident to communicate concerns with federal, state, or local officials.[69] Furthermore, the rule does not prohibit nursing homes from

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[62] Nancy Halstead & Kelly Hibbert, *CMS Reverses Course in Pre-Dispute Arbitration Agreement Ban*, REED SMITH LLP (June 13, 2017), https://www.healthindustrywashingtonwatch.com/2017/06/articles/regulatory-developments/medicare-medicaid-services-regulations/cms-reverses-course-in-pre-dispute-arbitration-agreement-ban/.

[63] *See id.*

[64] Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements, 82 Fed. Reg. 26649, 26650 (proposed June 8, 2017).

[65] *Id.*

[66] Pokiniewski, *supra* note 62.

[67] Halstead & Hibbert, *supra* note 65.

[68] *Id.*

[69] *Id.*

making the arbitration provision a condition of admission, but the language must be clear and included in the admissions contract.[70]

The comment period for the 2017 CMS rule is complete, and CMS has placed the rule into its long-term action category.[71] In drafting the proposed rule, CMS stated that it used public feedback and case law, following its 2016 rule, in an attempt to balance the benefits and drawbacks of pre-dispute arbitration agreements among nursing homes and their residents.[72] CMS specifically notes that arbitration provides "the expeditious resolution of claims without the costs and expense of litigation."[73] Court costs for litigation burden nursing homes and prevent them from allocating resources to their residents, and residents and their families may struggle to afford litigation themselves.[74] In addition, CMS attempts to address the concern that the elderly may not understand the right they are waiving by requiring transparency in arbitration agreements.[75]

Still, the proposed rule receives opposition. The American Association of Retired Persons (AARP) sees the rule as an opportunity for nursing homes to gain a bargaining advantage—potential residents may be left with the ultimatum to accept arbitration terms or be turned away.[76] 31 U.S. Senators also agree that the rule creates an unequal balance of power and have presented that issue, among others, in a letter to CMS.[77] AARP has identified other issues including that lawyer and arbitrator fees make arbitration a costly option for residents, the nursing home has the potential advantage of choosing the arbitrator, and arbitration does not create precedent for future claims.[78] In addition, the American Bar Association (ABA) is against the rule as it conflicts

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[70] *Id.*

[71] A&M Team, *Arbitration Agreements Violate Nursing Home Abuse Victims' Rights*, ATKINS & MARKOFF (April 25, 2018), https://atkinsandmarkoff.com/blog/arbitration-agreements-violate-nursing-home-abuse-victims-rights/.

[72] Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements, 82 Fed. Reg. at 26649, 26650.

[73] *Id.* at 26651.

[74] *Id.* at 26650.

[75] *Id.* at 26653.

[76] Victoria Sackett, *Nursing Home Residents Could Lose Their Day in Court*, AARP (August 15, 2017),
https://www.aarp.org/caregiving/health/info-2017/trump-nursing-home-arbitration-fd.html.

[77] Stark & Stark, *ABA Resists Mandatory Arbitration Clauses in Nursing Home Admissions Contracts*, STARK & STARK ATTORNEYS AT LAW (August 15, 2017), https://nursinghomelaw.stark-stark.com/2017/08/articles/aba-resists-mandatory-arbitration-clauses-in-nursing-home-admissions-contracts/.

[78] Sackett, *supra* note 79.

with case law on binding arbitration agreements.[79] While case law states that arbitration agreements cannot be singled out for disfavored treatment, the ABA contends that CMS still neglects precedent by, instead, completely favoring arbitration agreements in the nursing home setting.[80] The ABA further contends that the proposed rule does not protect nursing home residents.[81] In a letter to CMS, the ABA explained that they are against "the use of binding forms of alternative dispute resolution involving residents in disputes with long-term care facilities unless the parties agree to do so voluntarily and knowingly after a dispute arises."[82] The arguments for and against the proposed rule are many, and its implementation or revision could lead to even more debate.

## V. POTENTIAL IMPACT OF IMPLEMENTING THE 2017 CMS PROPOSED RULE

The 2017 proposed rule for the revision of requirements for nursing home arbitration agreements offers three changes to previous law. The first change lifts the ban on pre-dispute arbitration provisions in nursing home agreements. The second is that such arbitration provisions must include clear terms and transparent language. Third, the rule allows binding arbitration provisions to serve as a condition to nursing home admission. These proposed changes spark curiosity about how the rule would be applied in practice as well as how its application may impact the law and matters of public policy. The next section of this note will examine the potential legal impact of the proposed rule in regard to its enforcement through the FAA, signatory rights and issues associated with the rule's terms, and the concept of unconscionability in light of the rule's proposed changes. Then, this note will discuss matters of public policy including efficiency, ethics, the recognition of precedent, and the importance of informed decisionmaking with special attention given to how these concepts may be impacted by the proposed rule.

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[79] Stark & Stark, *supra* note 80.

[80] *Id.*

[81] *ABA Opposes Proposed Rule to Authorize Mandatory Pre-Dispute Arbitration in Nursing Home Contracts*, AMERICAN BAR ASSOCIATION (August 2017), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/august2017/arbitration/.

[82] *Id.*

### A. *Legal Impact*

The FAA requires that agreements to arbitrate "in contracts involving interstate commerce,"[83] such as those contracts in health care, be enforced. The terms of the 2017 proposed rule do not contradict the FAA and will likely receive support from the FAA and courts. However, legal issues related to signing the agreement and the contractual protection of unconscionability are not adequately addressed in the proposed rule. The proposed rule attempts to mitigate these issues by encouraging transparency in the arbitration provisions of nursing home agreements, but transparency alone does not alleviate the rule's lack of signatory rights nor its lack of protections of the right to fair contract.

#### 1. *JUDICIAL SUPPORT OF THE FEDERAL ARBITRATION ACT*

The enforcement of arbitration provisions is upheld by the FAA. The FAA was enacted by Congress in 1925 and "governs the enforcement of agreements to arbitrate in contracts involving interstate commerce or in maritime transactions."[84] This includes agreements to arbitrate in health care contracts.[85] In the past, the question of federal diversity, whether federal or state law should be applied when determining the enforceability of arbitration agreements, was a matter of great controversy. While the *Erie* Doctrine states that federal courts should apply state substantive law and federal procedural law in federal diversity cases, the Supreme Court rules differently when the FAA is involved.[86] In *Prima Paint Corp. v. Flood & Conklin Manufacturing. Co.*, 388 U.S. 395 (1967), the Supreme Court held that the FAA "creates a basis for federal substantive law under the commerce clause of the Constitution, notwithstanding the *Erie* Doctrine."[87] Therefore, federal law—the FAA—governs all questions of enforceability for arbitration agreements and preempts state law. However, state law may still be utilized in interpretation of a contract in dispute.[88]

Other Supreme Court cases have determined that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"[89] and that FAA substantial law is applicable in both federal and

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[83] Alper, *supra* note 18, at 477-78. *See also* FAA, *supra* note 15.

[84] Phelps, *supra* note 16, at 2.

[85] Alper, *supra* note 18, at 478.

[86] Phelps, *supra* note 16, at 2.

[87] *Id.*

[88] *Id.*

[89] *Id.* citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

state courts.[90] *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* was a case brought before the Supreme Court that addressed the scope of arbitrable issues.[91] Moses H. Cone Memorial Hospital and a contractor of Mercury Construction Corporation entered into a contract agreeing that the construction company would make additions to the hospital.[92] The agreement included a provision for binding arbitration in the event that certain claims were made.[93] Following the completion of the hospital additions, the contractor filed a claim requesting compensation for increased costs.[94] The hospital filed an action against the contractor and alleged that the contractor "had lost any right to arbitration under the contract due to waiver, laches, estoppel, and failure to make a timely demand for arbitration."[95] However, the contractor alleged that he had a right to arbitration under Section 4 of the FAA, which compels arbitration so long as the agreement to arbitrate itself is not in question.[96] The Supreme Court affirmed the court of appeals' ruling, which differed from that of the district court.[97] Citing the FAA, the Court held that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . [including allegations] . . . of waiver, delay, or a like defense to arbitrability."[98]

The Supreme Court's favor of the FAA is further supported in *Southland Corporation v. Keating*. Keating, a representative of a number of Southland franchisees, brought suit against Southland Corporation, the owner and operator of certain convenience stores, for alleged fraud, misrepresentation, breach of contract and fiduciary duty, and violation of California state disclosure requirements for franchises.[99] Citing the arbitration provision of the franchise agreements, Southland moved to compel arbitration for the franchisees' claims.[100] The superior court refused to enforce the arbitration agreement citing state statute, but the California appellate court reversed that decision and the Supreme Court agreed with the court of appeals' ruling.[101] The Supreme Court went on to say that the state statute "directly conflicts with [Section] 2 of the Federal Arbitration Act and [thus] violates the

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[90] *Id.* citing Southland Corp. v. Keating, 465 U.S. 1 (1984).
[91] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).
[92] *Id.* at 4.
[93] *Id.* at 4-5.
[94] *Id.* at 6.
[95] *Id.* at 7.
[96] *Id.*
[97] *Id.* at 3.
[98] *Id.* at 24-25.
[99] Southland Corp. v. Keating, 465 U.S. 1, 3-4 (1984).
[100] *Id.* at 4.
[101] *Id.* at 4-6.

Supremacy Clause [of the United States Constitution]" and that "[i]n enacting [Section] 2 of the [F]ederal [Arbitration] Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[102]

Not only is the Supreme Court strongly supportive of the FAA generally, but the Court has also shown its support of the FAA in the specific setting of nursing homes as well. *AT&T Mobility, LLC v. Concepcion* formed the Supreme Court's rationale for its ruling in *Marmet Health Care Center, Inc. v. Brown*, a case involving a nursing home.[103] In *Concepcion*, the Supreme Court held that the FAA preempted a state law which required that class arbitration be available in consumer contracts.[104] The FAA's Section 2 savings clause preserves "generally applicable contract defenses" of state law, but the Supreme Court found that requiring class arbitration served as an obstacle to the enforcement of the case's arbitration agreement as it was originally written.[105] The FAA requires that arbitration agreements be enforced as written.[106] Thus, the Supreme Court held that interference of this state rule was preempted by the FAA.

*Marmet* applied the rationale used in *Concepcion*—that the FAA preempts state law interfering with the enforcement of an arbitration agreement.[107] Respondents in this case were family members of residents who passed away while in the care of Marmet Health Care Center, a nursing home in West Virginia.[108] The family members alleged that the nursing home was negligent in the care of its residents, causing injuries or harm that resulted in their death.[109] Although the residents or family members had signed an agreement to arbitrate all disputes with the nursing home, the Supreme Court of West Virginia applied a state law that prohibited pre-dispute agreements to arbitrate wrongful death or personal injury claims, rendering the arbitration agreement unenforceable.[110] Invoking the logic in *Concepcion*, the Supreme Court ruled that the FAA preempted the West Virginia state law because it conflicted with the enforcement of an arbitration agreement,[111] consequently vacating the state court's judgement. The Court further explained that the FAA

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[102] *Id.* at 10.
[103] Bulgarella, *supra* note 30, at 372.
[104] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011).
[105] *Id.* at 335.
[106] *Id.* at 344.
[107] Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 533 (2012).
[108] *Id.* at 531.
[109] *Id.*
[110] *Id.* at 532.
[111] *Id.* at 533.

"includes no exception for personal-injury or wrongful-death claims" and that courts should "enforce the bargain of the parties to arbitrate."[112]

It is clear that the judiciary demonstrates a strong presumption in favor of the FAA. The Supreme Court has ruled in favor of the FAA over state law in matters of scope, application of state law, and arbitrable claims as discussed above. The Supreme Court has even ruled in favor of a pre-dispute arbitration agreement in the nursing home setting despite a state law demanding otherwise.[113] Because of this strong presumption in favor of the FAA and related precedent, it is likely that the 2017 CMS proposed rule's authorization of pre-dispute arbitration agreements will receive support from the Supreme Court. The proposed rule references the complaint that sought preliminary and permanent injunction of the 2016 rule brought by the AHCA and a group of nursing homes.[114] The district court that heard the complaint made it clear that the 2016 rule was likely in conflict with the FAA because of its prohibition of pre-dispute arbitration provisions in nursing home agreements.[115] The 2017 proposed rule removes that ban, explaining that "a policy change regarding pre-dispute arbitration will achieve a better balance between the advantages and disadvantages of pre-dispute arbitration for residents and their providers" and that the ban would have "impose[d] unnecessary or excessive costs on providers."[116] While permitting pre-dispute arbitration agreements will likely receive favor from the courts, the 2017 rule may still be objectionable for other reasons.

### 2. *SIGNATORY RIGHTS AND ISSUES*

The validity of an arbitration agreement comes into question when there is a potential issue with signing the agreement. In the nursing home setting, it is common for a third-party—a family member or durable power of attorney—to sign a nursing home admission agreement on behalf of the applying resident.[117] However, that third-party may not have the legal authority to enter the agreement on the resident's behalf.[118] Capacity to contract is another issue. Many individuals entering a nursing home may not

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[112] *Id.* at 532-33.

[113] *Id.* at 530.

[114] Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements, 82 Fed. Reg. 26649 (proposed June 8, 2017) (to be codified at 48 C.F.R. pt. 483).

[115] *Id.*

[116] *Id.*

[117] Alper, *supra* note 18, at 482.

[118] *Id.* at 482-83.

have the mental capacity to understand the document they are signing, and the stress often associated with entering a nursing home may exacerbate the problem. When nursing home admission agreements contain an arbitration provision, especially one that may be a condition to admission as the 2017 CMS proposed rule allows, signatory issues become even more important, but equally as complicated.

### a. *Agreement by a Third-Party*

There is some uncertainty as to whether or not a third-party can have authority to bind another individual to an arbitration agreement.[119] Some courts, for example, "have held that a relative who holds a power of attorney, durable power of attorney, or status as a guardian or conservator for a resident also has the authority, under principles of agency, to bind that resident to an arbitration agreement."[120] For example, *Kindred Nursing Centers Limited Partnership v. Clark* addressed the question of whether or not a nursing home resident could be bound by an arbitration agreement signed by the resident's power of attorney.[121] In *Kindred*, a wife and a daughter of a husband and a mother, respectively, both held power of attorney for their respective family member.[122] The wife and the daughter used their power of attorney to sign the necessary documents, including an agreement to arbitrate all claims, so that their family member could move into a nursing home operated by Kindred Nursing Centers.[123] When their family members died, they sued Kindred for insufficient care that allegedly caused their deaths.[124] Both the trial court and court of appeals agreed that the case should go to trial, and the Supreme Court of Kentucky agreed.[125] Citing the Kentucky State Constitution which safeguards the "sacred" and "inviolate" rights of access to the courts and trial by jury, the court determined that such rights could only be forfeited if done so explicitly in the power of attorney.[126] However, the Supreme Court reversed

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[119] John Schleppenbach, *Something Old, Something New: Recent Developments in the Enforceability of Agreements to Arbitrate Disputes Between Nursing Homes and Their Residents*, 22 ELDER L.J. 141, 169 (2014).

[120] *Id.* at 154 (citing *e.g.*, Moffet v. Life Care Ctrs. of Am., 219 P.3d 1068, 1079 (Colo. 2009); Emeritus Corp. v. Pasquariello, 95 So.3d 1009, 1012 (Fla. Dist. Ct. App. 2012); Barron v. Evangelical Lutheran Good Samaritan Soc'y, 265 P.3d 720, 726 (N.M. Ct. App. 2011)).

[121] Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S.Ct. 1421 (2017).

[122] *Id.* at 1425.

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.* at 1426.

that decision, saying that Kentucky's "clear-statement rule" violated the FAA.[127] By prohibiting a power of attorney from entering into an arbitration agreement without the express authority from the individual who granted the power, the state rule "flouted the FAA's command to place those agreements on an equal footing with all other contracts."[128]

While *Kindred* shows the Supreme Court's favor of enforcing arbitration agreements when signed by a power of attorney, lower courts in the past had considered signing an arbitration agreement to be outside the scope of a power of attorney's authority.[129] Still other courts disagree as to whether a family member who signs a nursing home resident's arbitration agreement is bound by it themselves as a beneficiary to the care received by their family member.[130] Another matter of controversy is whether implied authority to sign an arbitration agreement exists if the family member signing the agreement was given permission to do so by the resident at the time of signing.[131]

The 2017 proposed rule recognizes that "[u]nder the 2016 final rule, an arbitration agreement could be signed by another individual only if allowed by the relevant state's law, all of the other requirements in this section [of the rule] are met, and that individual had no interest in the facility."[132] The 2017 rule goes on to explain how it either does or does not retain certain provisions of the 2016 rule. It lifts the ban on requiring residents to sign an arbitration agreement as a condition of admission and retains the 2016 requirement that the resident receive a copy of the signed agreement.[133] Yet, it does not indicate its stance on the agreement being signed by an individual other than the nursing home resident. It simply goes on to discuss its proposed requirements of transparency and plain language in the agreement.[134] This is problematic. Under the proposed rule, it is unknown whether or not a third-party can sign an arbitration agreement on behalf of a potential nursing home resident. It is also unknown whether state or federal law governs this signatory matter. While the Supreme Court provides guidance in *Kindred* for what to do when

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[127] *Id.* at 1426-27.

[128] *Id.* at 1429.

[129] Schleppenbach, *supra* note 122, at 154 (citing e.g., Estate of Irons *ex rel.* Springer v. Arcadia Healthcare, Inc., 66 So. 3d 396, 400 (Fla. Dist. Ct. App. 2011); Ping v. Beverly Enter., Inc., 376 S.W.3d 581, 594 (Ky. 2012); Dickerson v. Longoria, 995 A.3d 721, 735 (Md. 2010)).

[130] *Compare id.* at 155, n. 78, *with id.* at 155, n.79.

[131] *Id.* at 155, n. 77 (comparing Ruesga v. Kindred Nursing Ctrs., LLC, 161 P.3d 1253, 1263 (Ariz. Ct. App. 2007), with Ashburn Health Care Ctr., Inc. v. Poole, 648 S.E.2d 430, 433 (Ga. Ct. App. 2007)).

[132] Medicare and Medicaid Programs; 82 Fed. Reg. at 26650.

[133] *Id.* at 26650-51.

[134] *Id.* at 26650.

a power of attorney signs an arbitration agreement, other signatory issues such as beneficiary signing or signing by a family member with nursing home resident permission are controversial among the courts. In such a matter of controversy, the proposed rule should offer guidance.

### b. *Capacity to Contract*

Capacity, especially among older adults, is another contract issue that may be present in the signing of an arbitration agreement, drawing the agreement's validity into question. State contract law generally requires the following six elements for a contract to be considered valid: (1) there are two or more parties to the contract, (2) consideration is present, (3) the contract includes an sufficiently definite agreement, (4) the parties have legal capacity to enter into a contract, (5) the parties mutually assent to the contract, and (6) the formation of the contract is not illegal.[135] As a necessary element of contract formation, lack of capacity is considered a contract defense, and it is governed by state law.[136] Lack of capacity is defined as the lack of "sufficient mental capacity to understand the nature and effect of the particular transaction."[137] In contrast, having capacity to contract means that the party possesses the "ability to understand in a meaningful way, at the time the contract is executed, the nature, scope and effect of the contract."[138] The existence of capacity is usually presumed, and refuting its existence requires an analysis of the party in question's mental condition at the time the contract was executed.

Capacity to contract is challenged in *Landers v. Integrated Health Services of Shreveport* and *Liberty Health & Rehab of Indianola, LLC v. Howarth*. In *Landers*, the Louisiana appellate court affirmed a trial court decision in which an elderly woman was determined to have lacked the

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[135] Apler, *supra* note 18, at 478 (citing Grenada Living Ctr. v. Coleman, 961 So.2d 33, 37 (Miss. 2007); GGNSC Batesville, LLC v. Jonson, 109 So.3d 562, 565 (Miss. 2013); *see also* Wallace v. Shreve Mem'l Library, 79 F.3d 427, 430 n.4 (5th Cir. 1996); State ex rel. AMFM, LLC, 740 S.E.2d at 73)).

[136] *Id.* at 479 (citing Rowan v. Brookdale Senior Living Cmtys., Inc., No. 1:13-CV-1261, 2015 WL 9906264, at *4 (W.D. Mich. June 1, 2015). *See supra* notes 104-26 and accompanying text.

[137] *Id.* (citing McElroy v. Mathews, 263 S.W.2d 1, 10 (Mo. 1953); *see also* Ortelere v. Teachers' Ret. Bd., 250 N.E.2d 460, 465 (N.Y. 1892); Shippers Exp. v. Chapman, 364 So. 2d 1097, 1100 (Miss. 1978)).

[138] *Id.* at 479-80 (citing Gaddy v. Douglass, 597 S.E.2d 12, 20 (S.C. Ct. App. 2004); *Ortele*, 250 N.E.2d at 464; *Cundick v. Broadbent*, 383 F.2d 157, 160 (10th Cir. 1967); *Bitler Inv. Venture II, LLC v. Marathon Ashland Petro., LLC* 779 F. Supp. 2d 858, 883 (N.D. Ind. 2011)).

capacity to contract, thus voiding an agreement to arbitrate.[139] The elderly woman had signed a contract with the nursing home upon admission, agreeing to address all contractual disputes through arbitration before deciding to go to trial.[140] However, the elderly woman did not have capacity to contract; she required constant daily nursing care and supervision, and she suffered from forgetfulness, depression, schizophrenia, and paralysis.[141] Therefore, the agreement was invalid.

The litigation, rather than arbitration, of a wrongful death dispute was at issue in *Liberty Health*.[142] The decedent had signed an agreement to arbitrate upon being admitted to Liberty Health's nursing home, but the decedent's beneficiary argued that the decedent lacked the requisite mental capacity that would make the agreement enforceable.[143] The Mississippi court, recognizing that the burden of proof for mental capacity is unclear, decided to make the standard that of "clear and convincing evidence."[144] Drawing on state precedent indicating that mental incapacity is demonstrated in instances when a person's "mind [was] so unsound, or [whether he was so] weak in mind, or so imbecile, no matter from what cause, that he [could not] manage the ordinary affairs of life,"[145] the court gave a medical examination performed by a nurse at the time of the decedent's admission to the nursing home the greatest evidential weight.[146] The examination report indicated that the decedent had issues with memory.[147] Further testimony showed that the decedent had trouble with tasks such as writing a check, and other evidence was presented that the decedent had a recent fall and was rapidly declining in mental and physical health.[148] The court determined that this evidence was sufficient to establish the clear and convincing standard, and the agreement compelling arbitration was found void.[149]

*Landers* and *Liberty Health* recognize that determining the presence, or lack thereof, of mental capacity is a difficult task. However, the courts use things like an individual's level of independence, any mental illnesses or conditions they may have, and their ability to perform certain tasks to support

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[139] Landers v. Integrated Health Servs., 903 So.2d 609, 612 (La. Ct. App. 2005).

[140] *Id.* at 611.

[141] *Id.* at 612.

[142] Liberty Health & Rehab of Indianola, LLC v. Howarth, 11 F.Supp. 3d 684, 685 (N.D. Miss. 2014).

[143] *Id.*

[144] *Id.*

[145] *Id.* at 687 (citing Shippers Exp. v. Chapman, 364 So. 2d 1097, 1100 (Miss. 1978)).

[146] *Id.* at 686-87.

[147] *Id.* at 687.

[148] *Id.* at 688.

[149] *Id.*

their analysis. And, the court's findings illustrate how important it is to ensure that an individual has capacity to enter an arbitration agreement. Despite the clear importance of this quality, the 2017 proposed rule does not address capacity at all. In contrast, the 2016 rule addressed it by saying that issues of capacity would be left to state law.[150] Are courts to assume that the 2017 rule follows that rationale? Or, will federal law trump state law on issues of capacity? Rather than providing appropriate guidance, the 2017 rule is silent on an important issue of contract.

### 3. *UNCONSCIONABILITY*

The concern of unconscionability arises when an individual enters an unfair contract. Unconscionability is a contract law defense that is used when a single contract term is grossly biased in favor of one contracting party or when the entire contract itself is one-sided.[151] The events surrounding the admission of an individual into a nursing home are often very stressful, leading potential nursing home residents and their loved ones to rush into agreements or overlook certain terms.[152] The emergent need to enter a nursing home can also create a bargaining disadvantage for potential residents, especially if an arbitration provision is mandatory for admission.[153]

Business transactions follow a contract law analysis that says that if the provision is "legible, not hidden, and furthers the policy of the state," then it is enforceable.[154] However, the legal system has a moral obligation to ensure a fair contract.[155] This obligation should apply especially to the nursing home setting, recognizing that respect for the elderly is more important than the efficiency of a business transaction. [156] The contract defense of unconscionability provides further protection against unfair contracts. In cases that challenge arbitration provisions in the nursing home setting, unconscionability can be present in the procedures that a nursing home follows when contracting with potential residents, substantively in the contract itself, or sometimes both procedurally and substantially. [157] Procedural

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[150] 42 C.F.R. § 483.

[151] Ginsberg, *supra* note 5, at 284-85 (discussing procedural and substantive unconscionability).

[152] Alper, *supra* note 18, at 471-72.

[153] *Id.* at 476.

[154] Ginsberg, *supra* note 5, at 305.

[155] *See* Benjamin Pomerance, *Arbitration Over Accountability? The State of Mandatory Arbitration Clauses in Nursing Home Admission Contracts*, 16 FLA. COASTAL L. REV. 153, 169 (2015).

[156] *See id.*

[157] *See id.* at 172.

unconscionability in a nursing home admission contract is measured by three factors: (1) a lack of capacity or competence, (2) the level of meaningful choice present in the contract, and (3) the "degree of medical urgency for admission to a nursing home."[158] Substantive unconscionability is observable when one of four characteristics are present in a nursing home admission contract: (1) the terms and conditions disproportionately favor the nursing home, (2) there are unilateral arbitration requirements, (3) there is a high financial burden placed on a party to the contract that attempts to bring suit, and (4) there are limitations on the recovery allowed should litigation be pursued.[159]

As discussed above, *Marmet Health Care Center, Inc. v. Brown* addresses FAA preemption of state law.[160] *Marmet* was the consolidation of three cases that involved the issue of preemption, however, other issues in those cases were not addressed by the Supreme Court and were ruled upon by the state of West Virginia. Two of the three consolidated cases challenged that the nursing home admission contracts were unconscionable, an issue that is governed by state contract law. Both cases, "*Brown 1*" and "*Brown 2*," contain useful precedent related to unconscionability.[161] In *Brown 1* and *2*, the plaintiff residents were admitted into the defendant nursing home at very stressful times.[162] Their physical and mental impairments had become so severe that the residents needed to be admitted to a nursing home as soon as possible, and the residents and their families looked over an arbitration clause that was "buried" in the nursing home admission agreement, requiring them to arbitrate all grievances, including the issue in this case of wrongful death.[163] The West Virginia court found that the residents had little choice in the agreement because of the stress they were under and that the provision itself was not well explained,[164] making the agreement procedurally unconscionable. While procedural unconscionability would be enough to deem the agreement enforceable, the court also noted the substantive unconscionability of the nursing home admission contracts.[165] The terms of the agreement disproportionately favor the nursing home.[166] The court says that a reasonable person would expect to be able to invoke their constitutional right to trial in

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[158] *Id.* at 172-73.

[159] *Id.* at 180-81.

[160] *See supra* Section V(A)(1).

[161] Brown v. Genesis Healthcare Corp., 724 S.E.2d 250, 280-81 (W. Va. 2011), *vacated sub nom.* Marmet Health Care Ctr. Inc., v. Brown, 565 U.S. 530 (2012).

[162] *Id.* at 263.

[163] *Id.* at 292.

[164] *Id.*

[165] *Id.* at 289.

[166] *Id.* at 292-97.

the event that a nursing home's negligence resulted in the death of a resident.[167] It is against public policy, in the court's view, to require that an arbitration clause be signed "prior to the alleged occurrence of negligence that resulted in the person injury or wrongful death of a nursing home resident."[168]

Nursing home residents should be protected from unconscionable nursing home admission contracts. The protections from unconscionability offered by the 2017 proposed rule include transparency and clear agreement terms.[169] It states that, "[i]f an agreement for binding arbitration is a condition of admission, it must be in plain writing in the admission contract."[170] In addition, nursing homes using binding arbitration must post a notice that is clearly visible to residents and visitors explaining its arbitration policy.[171] While these are positive efforts toward a fair agreement, they are not enough to protect residents. The proposed rule allows an arbitration agreement to serve as a condition to a resident's admission.[172] Similar to the situation in *Brown*, this completely removes the nursing home residents' opportunity to make a meaningful choice and takes advantage of the urgency that residents and their families often experience when entering a nursing home, factors that make the agreement procedurally unconscionable. Furthermore, requiring residents to sign an arbitration agreement prior to a dispute is something that *Brown* considers substantively unconscionable. Pre-dispute arbitration agreements disproportionately favor nursing homes by limiting the legal action that residents may take. Because of the lack of protections offered by the 2017 proposed rule, nursing home residents may be more likely to enter an unconscionable agreement should the rule be enforced.

### A. *Impact on Public Policy*

Public policy favors efficiency, a quality that is commonly attributed to arbitration as opposed to litigation. However, public policy also favors fairness, something that the 2017 proposed rule lacks because of the bargaining advantage that it gives to nursing homes and takes away from nursing home residents. The proposed rule also lacks public policy values of ethical responsibility, precedent, and informed decisionmaking. Making an arbitration provision a condition to contract is unethical, especially when the stressful, confusing situation of entering a nursing home is involved. In

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[167] *Id.* at 294.
[168] *Id.* at 292.
[169] 82 Fed. Reg. at 26651.
[170] *Id.*
[171] *Id.*
[172] *Id.*

addition, it goes against an individual's right to make an informed decision to bar them from access to precedent set by prior cases that nursing homes have arbitrated.

### 1. *EFFICIENCY*

Benefits attributed to ADR commonly relate to its efficiency. Methods of ADR can save time and money for courts, nursing homes, and residents. In fact, while litigation can take anywhere from about 26 to 48 months, consumer arbitration proceedings are typically resolved within seven months.[173] And, on average, consumer arbitration claims cost only $149.50 for businesses and $46.63 for consumers per arbitration claim.[174] Comparatively, litigation can be incredibly costly for both parties in court costs and attorney's fees.[175] In the nursing home setting, lower dispute resolution costs mean that nursing home resources can be allotted to resident care, rather than paying for litigation.[176] However, it is relevant to note that some studies have found that the efficiency of arbitration in health care disputes may, in fact, be less efficient than expected.[177]

Furthermore, while litigation is an adversarial, structured process, arbitration allows for closure and flexibility.[178] In this way, not only is arbitration economically advantageous, but also interpersonally. Grieving families who have lost their loved ones in a nursing home sometimes seek legal redress for wrongful death or negligence by the nursing home. Arbitration provides families a flexible forum in which they can express their grievances and receive an explanation or apology for what may have went wrong in their loved one's care.[179] This results in closure and the preservation of relationships.[180] And, while arbitration is a private process, families and nursing home representatives can be confident in the ability of their arbitrators to make a sound judgement, especially if the arbitrator is specialized in

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[173] Bulgarella, *supra* note 30, at 379 (citing Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843, 845 (2010)).

[174] *Id.* at 382 (citing Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, METROPOLITAN CORP. COUNS. 32 (July 2006)).

[175] *Id.* at 381.

[176] *Id.* at 380-81.

[177] *See* Nussbaum, *supra* note 24, at 276 (discussing studies that found correlations between arbitration and increases in the cost of liability for medical systems).

[178] Bugarella, *supra* note 30, at 385.

[179] *Id.*

[180] *Id.* at 388.

medicine or elder care.[181] Their decisions are presumed to be valid, which provides both economic and therapeutic benefits.[182]

Saving time and money as well as providing an appropriate forum for dispute resolution is definitely favorable to the public, making arbitration a method of dispute resolution that is generally favorable to public policy. The 2017 proposed rule recognizes the favorability of arbitration. It notes the lower costs that are associated with arbitration as compared to litigation.[183] CMS also recognizes that litigation is a time-consuming process, and the time necessary for litigation is often not a luxury afforded to elderly individuals in the nursing home setting.[184] Voicing a change of opinion from their 2016 rule, the 2017 proposed rule states that CMS "believe[s] that arbitration agreements are, in fact, advantageous to both providers and beneficiaries because they allow for the expeditious resolution of claims without the cost and expense of litigation."[185] The agency now believes that pre-dispute arbitration agreements should not be banned, but, instead, promoted for their "efficiency and fairness."[186] While arbitration is recognized for its efficiency, the proposed rule styles arbitration as something far from a "fair" method of dispute resolution. Allowing an arbitration provision to serve as a condition to a potential resident's admission, and requiring that it be singed prior to a dispute, removes any meaningful choice from the resident and is unconscionable. Efficiency should not outweigh the importance of fairness, a quality that CMS inappropriately bestows upon its proposed rule.

### 2. *ETHICS*

Ethical considerations are extremely important to make in any medical setting, including nursing homes. The American Medical Association (AMA) sets forth a Code of Ethics that medical professionals adhere to in their practice of medicine.[187] It promotes access to care, freedom of contract, and patient choice.[188] The AMA also maintains a Journal of Ethics that addresses contemporary issues in medical ethics. One such contemporary issue is caring for the elderly. The AMA says that "we are all responsible for all Grannies –

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[181] *See id.* at 385-86.
[182] *Id.* at 383.
[183] 82 Fed. Reg. at 26651.
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] Ginsberg, *supra* note 5, at 311.
[188] *See id.* at 311-13.

mine, yours, and everyone else's."[189] It is the responsibility of health care professionals to provide the elderly with affordable options for care, to provide support and information to the families of elderly patients, and to "recognize the individuality and preferences of their older patients and not be pressured to base decisions on the financial interests of their institutions."[190] The AMA makes it clear that the elderly are a population in need of advocacy and support, both inside and outside of the health care setting. It is the ethical responsibility of health care providers to protect them.

A health care provider has a responsibility to their patient as a person, not just a health condition, and all aspects of the person should be considered.[191] This includes how a patient is impacted legally. The ABA recognizes this connection between the medical and legal worlds and opposes the inclusion of binding pre-dispute arbitration provisions in nursing home admission contracts as the 2017 proposed rule allows.[192] According to the ABA, the rule "fails to protect residents' rights and interests."[193] Even though the proposed rule promotes transparency, the emotional, tense feelings associated with nursing home admission make it "virtually impossible for an applicant or family representative to give fully informed, voluntary consent to arbitration provisions relating to facility admission."[194] The ABA references a letter from 31 U.S. senators who are opposed to "forced" arbitration clauses in nursing home agreements.[195] The letter says that the proposed rule "prevent[s] many of our country's most vulnerable individuals from seeking justice in a court of law and instead funnel[s] all types of legal claims, no matter how egregious, into a privatized dispute resolution system that is often biased toward the nursing home."[196] Obstructing justice in this way is unethical. The ethical responsibility of health care professionals is to protect the elderly, and the ethical responsibility of those in the legal field is to protect justice. The proposed rule conflicts with both of these ethical responsibilities.

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[189] Carol Levine, *Who's Responsible for Granny?* 16 AMA J. OF ETHICS 373, 376 (2014).

[190] *Id.* at 376-77.

[191] *See* Ginsberg, *supra* note 5, at 276.

[192] *ABA Opposes Proposed Rule to Authorize Mandatory Pre-Dispute Arbitration in Nursing Home Contracts, supra* note 84.

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.*

### 3. *PRECEDENT AND INFORMED DECISION-MAKING*

Arbitration is not a perfect method of conflict resolution. A common challenge to arbitration is that it denies individuals their constitutional right under the Seventh Amendment "to have their claims heard in court in front of a jury of their peers."[197] Instead, the claims are heard solely by an arbitrator who has broad authority in their decision-making.[198] An arbitrator is not bound by the Federal Rules of Evidence, so they have discretion as to what evidence is admissible or inadmissible.[199] Furthermore, an arbitrator's decision is binding, final, and very difficult to appeal.[200] This is regardless of whether or not their decision is consistent with the law.[201] An arbitrator does not have to support their decision with relevant facts or law but, instead, may use whatever reasoning they deem appropriate in their ruling.[202]

Arbitration is promoted as a private process.[203] Usually, information about settlement amounts agreed to in arbitration may be available to the public, but the proceedings are not.[204] This allows significantly less public backlash upon the nursing home and potentially preserves the relationship between the nursing home and resident so that the resident can continue living in the facility.[205] But, while this privacy can be a benefit to both nursing homes and their residents, it is not always appropriate. A concern is that arbitrators that are continually sought by certain nursing homes to preside over their arbitration proceedings may develop bias in favor of the nursing home.[206] But, because these proceedings are private, the trend may go unnoticed.

Another major issue arising from the privacy of arbitration is that it creates a lack of precedent. And, because arbitrators have broad authority in their decision-making, they are not required to abide by arbitration precedent—they are not even required to abide by legal precedent.[207] In wrongful death and negligence claims that are often brought by nursing home residents,[208] this is especially problematic because lives could be arbitrated inconsistently. In addition, arbitrated cases do not become part of the public

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[197] Bulgarella, *supra* note 30, at 392.
[198] Burgess, *supra* note 42, at 3.
[199] *Id.*
[200] *Id.* at 3-4.
[201] *Id.* at 4.
[202] *See id.*
[203] *See* Bulgarella, *supra* note 30, at 388.
[204] *Id.*
[205] *Id.*
[206] *See id.* at 392.
[207] Burgess, *supra* note 42, at 4.
[208] *Id.*

record,[209] so potential nursing home residents have no way of knowing if the facility they are considering as their new home may be prone to serious legal claims. This lack of information is detrimental to a potential resident's decision-making process of choosing a nursing home.

The 2017 proposed rule supports their changes to the 2016 rule with a statement about policy: "We believe that a policy change regarding pre-dispute arbitration will achieve a better balance between the advantages and disadvantages of pre-dispute arbitration for residents and their providers."[210] Furthermore, CMS feels that "an outright ban on pre-dispute arbitration agreements and the further restrictions on post-dispute arbitration agreements do not strike the best policy balance."[211] The "best policy balance," according to the proposed rule, is allowing nursing homes to require pre-dispute arbitration agreements so long as its terms are transparent to residents.[212] While this process is efficient, it lacks fairness, ethical responsibility, and the opportunity for informed decision-making. It is not a fair balance to require a nursing home to simply update contract terms and provide information but require nursing home residents to sign away their right to trial by jury. It is not ethical to make arbitration a condition to admission when residents are in the stressful situation of being admitted to a nursing home. Lastly, it is against the public policy of informed decision-making to preclude nursing home residents from the opportunity to review prior arbitrated cases of the nursing home where they may spend the rest of their lives.

## VI. RECOMMENDATIONS

There are opportunities for improvement of the 2017 proposed rule and arbitration in general. One possibility for improvement is to create a uniform arbitration clause to be used in nursing home admission contracts.[213] This clause would provide transparent terms that outline who may sign the agreement and what that individual would be bound to by contract. It would clearly inform the potential resident of the benefits of arbitration, such as cost savings and quick dispute resolution, but it would allow them the opportunity to either decline signing the provision or rescind their signature within a certain number of days. This would provide the resident with more meaningful choice in the contractual process and prevent the agreement from being considered unconscionable. Alternatively, and even more transparent, would

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[209] *Id.* at 16.
[210] 82 Fed. Reg. at 26650.
[211] *Id.*
[212] *Id.*
[213] Bulgarella, *supra* note 30, at 400.

be to remove arbitration from the admission contract entirely. Instead, arbitration could be considered as a method of conflict resolution *post*-dispute.

Despite the questions of fairness, ethics, and precedent associated with arbitration, this method of conflict resolution is typically favored by public policy. However, there is an opportunity for statutory intervention that could protect nursing home residents from the confines of a mandatory arbitration agreement. Florida courts have often stated that "no valid agreement exists if the arbitration clause is unenforceable on public policy grounds." [214] Accordingly, legislation should be introduced that creates rights for the elderly and nursing home residents, especially in the nursing home admissions process, and establishes public policy values that would refute unconscionable arbitration agreements. While the legislation may not conflict with the FAA, it can provide additional protections from unconscionability by prohibiting conditional acceptance to a nursing home based on an agreement to arbitrate.

In general, arbitration could be improved through the use of a system for legal precedent.[215] People have the right to know about legal claims against organizations that they are involved with, especially nursing home residents. Long-term care facilities are not just companies, but often homes. It is important that potential nursing home residents know everything they can about the place where they will be living. Without public precedent, nursing home residents cannot make a fully informed decision. Furthermore, legal precedent would hold arbitrators and nursing homes accountable. Arbitrators would need to make consistent decisions, a practice that promotes fairness, and nursing homes would be responsible for the practices, and possibly mistakes, that led to arbitration.[216] Transparency through legal precedent would greatly benefit the public in this way.

## VII. CONCLUSION

The 2017 proposed rule issued by CMS lifts a ban on pre-dispute arbitration provisions in nursing home agreements. It also allows those provisions to serve as a condition to nursing home admission. And, while the proposed rule requires that arbitration provisions include clear terms and language, these transparency requirements are not enough protection from mandatory pre-dispute arbitration agreements. Arbitration can be beneficial to

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[214] Shotts v. OP Winter Haven, Inc., 86 So. 3d 456, 459 (Fla. 2011). *See also*, Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999), Global Travel Marketing, Inc. v. Shea, 908 So. 2d 392, 398 (Fla. 2005); FL-Tampa, LLC v. Kelly-Hall, 135 So. 3d 563, 568 (Fla. Dist. Ct. App. 2014).

[215] Bulgarella, *supra* note 30, at 403-04.

[216] *See id.* at 403-05.

nursing homes and their residents, but the proposed rule should not make agreement to such a provision a condition of admission. Making a pre-dispute arbitration agreement a requirement of admission is unconscionable and unethical. Of additional concern, the proposed rule does not provide enough guidance on who may sign the agreement. It also does not address public policy concerns of precedent and informed decision-making. Therefore, while arbitration in the nursing home setting may be efficient and supported by the FAA in most contexts, this proposed rule violates other areas of the law and public policy that should make it unenforceable.